
DATE: December 18, 1992
CASE NO. 88-ERA-1

IN THE MATTER OF

W. ALLAN YOUNG,

COMPLAINANT,

v.

PHILADELPHIA ELECTRIC COMPANY,
AND E. H. HINDS COMPANY,

RESPONDENTS.

CASE NO. 87-ERA-11

IN THE MATTER OF

W. ALLAN YOUNG,

COMPLAINANT,

v.

PHILADELPHIA ELECTRIC COMPANY,

RESPONDENT.

CASE NO. 87-ERA-36

IN THE MATTER OF
W. ALLAN YOUNG,
COMPLAINANT,

v.

PHILADELPHIA ELECTRIC COMPANY,
RESPONDENT.

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BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER
AND ORDER APPROVING SETTLEMENT
AND DISMISSING COMPLAINT WITH PREJUDICE

Before me for review are the Recommended Decision and Order (R.D. and O.) and the Order Approving Settlement of the Administrative Law Judge (ALJ) in these cases arising under Section 210 of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). Before the hearing in these consolidated cases, the ALJ recommended approval of the settlement agreement and stipulation of dismissal submitted by Complainant and Respondent E.H. Hinds Company in Case No. 88-ERA-1. The ALJ recommends that the complaints filed against Respondent Philadelphia Electric Company (PECO) in these cases be dismissed because, although Complainant had engaged in protected activity, the evidence of record did not support a finding that PECO had actual knowledge of that fact. PECO's action, therefore, could not have been motivated by the protected activity and it would not be prohibited under the ERA.

Upon review of the record in these cases, I agree with the ALJ's recommendation to dismiss the complaints. While the record and applicable law fully support the ALJ's conclusion that Complainant failed to establish a prima facie case of discriminatory action, for the reasons discussed *infra*, I am dismissing the complaints under a different rationale.

BACKGROUND

In September 1984, John Austin, a modification superintendent at PECO's Peach Bottom Atomic Power Station, received some information that Complainant had displayed behavior which reflected untrustworthiness and unreliability while working for another contractor at Peach Bottom. R.D. and O. at 5; Transcript (T.) at 62-64. In late September or early October, Austin received a memorandum from the superintendent of that contractor which tended to further substantiate Complainant's unreliability. R.D. and O. at 6; T. at 97-98. On October 29, 1984, Austin met with Samuel Tharpe, Chief Security Coordinator at Peach Bottom, and Richard Fleischmann, plant superintendent, to discuss whether Complainant should be excluded from the site. R.D. and O. at 6; T. at 121-22, 158-59. On that date, as a result of the meeting, Tharpe changed Complainant's security classification to a Code 9 which prevented his unescorted access to Peach Bottom until

further investigation. R.D. and O. at 6-7; T. at 160-61.

On October 15, 1985, Complainant was referred for a position with Hinds at Peach Bottom but was denied clearance

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to enter the work site by PECO security. R.D. and O. at 7. Complainant was referred to a position at Peach Bottom with Catalytic on October 14, 1986, but was removed from a training class because he lacked a security clearance and thus was not eligible for employment. Complainant was again referred to work for Catalytic on May 7, 1987, but was unable to obtain a security clearance, was required to remain in the security area, and was eventually laid off. On June 15, 1987, after conducting a review of Complainant's employment history, PECO found a sufficient basis to remove Complainant's Code 9 security classification. *Id.*

Complainant alleges in these cases that he was discriminatorily denied access to work. *Id.* at 2. The ALJ initially concluded that PECO is an employer and Complainant an employee within the meaning of the ERA. *Id.* at 8. Next, the ALJ found that Complainant engaged in protected activity and was subjected to adverse action by PECO. Complainant failed to prove, however, that the persons responsible for withdrawing his unescorted access to the work site (Fleischmann, Tharpe, and Austin) had any prior knowledge of his safety complaints. *Id.* at 9. The ALJ therefore concluded that Complainant had failed to establish a prima facie case of discriminatory action.[1]

DISCUSSION

A. *Settlement of Complaint Against E. H. Hinds Company*

The settlement agreement appears to encompass the settlement of matters arising under various laws, only one which is the ERA. For the reasons set forth in *Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Sec. Ord., Nov. 2, 1987, slip op. at 2, I have limited my review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegation that Respondent E. H. Hinds Company violated the ERA. 42 U.S.C. § 5851(b)(2)(A).

Upon review of the terms of the agreement and the record in this case, I find that the agreement is fair, adequate and reasonable, and therefore, I approve the agreement and accompanying stipulation of dismissal. Accordingly, the complaint in Case No. 88-ERA-1 is DISMISSED with prejudice as to E. H. Hinds Company, as provided in the settlement agreement.

B. *Complaints Against PECO*

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To establish a prima facie case of discriminatory action, the complainant must show that he engaged in protected activity of which the respondent was aware and that the respondent took adverse action against him. The complainant must also present evidence sufficient to at least raise the inference that protected activity was the likely motive for the adverse action. *Jain v. Sacramento Mun. Util. Dist.*, Case No. 90-ERA-1, Sec. Dec., Apr. 2, 1992, slip op. at 2; *Dartey v. Zack Co.*,

Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-8.

The ALJ found that Complainant had engaged in protected activity and that Respondent took adverse action against him, but concluded that Fleischmann, Tharpe and Austin had no knowledge of Complainant's protected activity when the decision was made to change his security clearance. A review of the record, however, establishes, as argued by Complainant, see Complainant's brief (Com Br.) at 6, 18, that Tharpe had knowledge of Complainant's protected activity in May 1984. Tharpe testified that on May 18, 1984, a former employee of Catalytic told him that Complainant had worked at TMI and was involved in suing the Nuclear Regulatory Commission and two other companies for overexposure. T. at 146-47. This testimony is corroborated in a memorandum by Robert Deneen, PECO's Director of Security, T. at 272, in which he reports a conversation with Tharpe to the same effect. [2] See Complainant's Exhibit 3. I therefore conclude that Tharpe was aware of at least some of Complainant's protected activity prior to the adverse action being taken. [3]

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In determining if a prima facie case has been established, temporal proximity between the protected activity and the adverse action may be sufficient to support the inference that the protected activity was the motivation for the adverse action. Nichols v. Bechtel Constr., Inc., Case No. 87-ERA-0044, Sec. Dec., Oct. 26, 1992, slip op. at 12. Where, however, a significant period of time elapses between the time at which the respondent is aware of the protected activity and the time of the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. Shusterman v. Ebasco Serv., Inc., Case No. 87-ERA-27, Sec. Dec., Jan. 6, 1992, slip op. at 8-9.

In the instant case, Tharpe was aware of Complainant's protected activity in May 1984 and no adverse action was taken until October 1984. In view of the significant period of time between Tharpe's awareness of the protected activity and the adverse action, and considering that Austin, the individual who initiated the adverse action, T. at 158-59, was not at that time aware that Complainant had engaged in protected activity, I conclude that the evidence is insufficient to raise the inference that protected activity was the likely motive for the adverse action. Complainant has therefore failed to present a prima facie case of discriminatory action based on his protected activity. [4]

Accordingly, the complaints against PECO in these cases are DISMISSED.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The ALJ also found that the evidence of record clearly supports PECO's position that Complainant's past work record made his reliability and trustworthiness suspect and it was thus compelled to alter Complainant's security status to maintain the safety of the facility and remain in compliance with the Nuclear Regulatory Commission's regulations. R.D. and O. at 9. Dec., Apr. 2, 1992, slip op. at 2; Dartey v. Zack Co., Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-8.

[2] Tharpe also testified that in May 1984 he was not aware of any claims that Complainant had before the Department of Labor or the NRC or any complaints made to Hake Company, GE, GAPCO or PECO regarding ALARA (as low as reasonably achievable) practices or radiation shielding practices at Peach Bottom in 1983 or 1984. T. at 234. This testimony does not contradict Tharpe's prior testimony as it involves protected activity at Peach Bottom whereas the earlier testimony concerns protected activity at PECO's TMI facility.

[3] The record shows that, prior to the change in Complainant's security status, Austin knew only that Complainant had filed a complaint against Hake Company with the Department of Labor, but there is no indication that Austin knew it involved protected activity. See T. at 99-100. Austin testified that he assumed that case was based upon Complainant's dismissal for "unfair labor practices." He added that he learned that Complainant's claim against Hake involved protected activity the week before the hearing. T. at 112. With respect to the complaint against GAPCO in 1984, Austin stated that he became aware that it involved protected activity in 1987. The record fails to show that Fleischmann had any prior knowledge of Complainant's protected activities.

[4] In view of my conclusion that Complainant failed to establish a prima facie case, I need not address whether PECO properly classified him as a security risk. See Com. Br. at 25, 30.